Central Law Journal.

ST. LOUIS, MO., JULY 8, 1898.

By the ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdict, and it was regarded as not only proper but requisite that they should be coerced to an agreement upon a verdict. The rigor as well as absurdity of this old rule is illustrated by the statement in Blackstone to the effect that "if the jurors do not agree in their verdict before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them to town in a cart." In fact jurors, in the days of Coke and Blackstone, failing to agree were compelled to undergo in many instances greater punishment than the criminal himself. This practice has however gradually been swept away, giving place to methods under which the independence of a juror is respected. A case which well illustrates the modern doctrine on this subject and the care with which courts of law guard the rights of jurors has been recently decided by the New York Court of Appeals—People v. Sheldon. It was a trial for murder in the first degree wherein it appeared that the jury retired to consider their verdict in the evening of Thursday, March 11th. The next day, about noon, they came into court for further instruction, and after receiving it, again retired. In the afternoon of that day they again came into court and announced that they had not agreed upon a verdict. The court then instructed them with reference to the importance of the case and of their agreeing. They retired, and later in the afternoon returned and asked for information with reference to some of the evidence, which they received, and then retired. In the morning of the following day, Saturday, they were brought in, and the foreman presented a written communication to the court, stating that it was impossible, in his opinion, for them to agree. The court ordered them to be sent back, saying: "I have made my own arrangements so as to be back at your call, both for to-day and for some time in the future, so that this case may be fully disposed of if there is a possibility of it." In the afternoon of that day they again returned without a verdict, and the court then instructed them at considerable length upon the importance of their agreeing, saying that a failure to agree was almost to confess incompetency in the matter; that "I have laid aside my other engagements so that this case can be attended to, because I appreciate the importance of it, and I would like to enforce upon you an appreciation of the importance of settling this question. It has got to be settled. * * * I have arranged with the sheriff that you shall occupy this room from now on to the completion of your labors. Of course, I don't know how long it will take." Later in the day the court ordered that the jury should be conducted to their meals on the following day, Sunday, and Monday morning. On Monday morning, March 15th, the jury came into court and rendered a verdict of guilty as charged in the indictment. They had been out about eighty-four hours, without beds or cots, and during the first forty hours were confined in a small room. It was held by the court of appeals that the agreement of the jury should be regarded as coerced, and a new trial granted. The opinion of Parker, C. J. contains a review of the modern cases on the subject, from which, however, is omitted the recent cases of State v. Kelley, 24 S. E. Rep. 45 and North Dallas Circuit Ry. Co. v. McCue, 35 S. W. Rep. 1080, wherein the Supreme Courts of South Carolina and Texas took the same view as that of the New York court.

The courts of New York have in many earlier cases upheld the independence of jurors and have freely set aside verdicts obtained by coercion. People v. Olcott, 2 Johns. Cas. 301; People v. Goodwin, 18 Johns. 187; Green v. Telfair, 11 How. Pr. 260; Slater v. Mead, 53 How. Pr. 59; Ingersoll v. Town of Lansing, 51 Hun, 103; Berry v. People, 1 N. Y. Crim. Rep. 43, 77 N. Y. 588. In Physive v. Shea, 75 Ga. 466, a new trial was granted, where a verdict was rendered shortly after the judge told the jury (which had been out all night) that they could have breakfast at their own expense, they having had no supper. In Chesapeake, etc., R. R. Co. v. Barlow, 86 Ky. 577, the jury reported inability to agree. The trial judge said: "This is too common, and you ought to agree;" that he would not discharge them, but should keep them together for the remaining three weeks of the term unless they agree. They agreed

next day. The verdict was set aside. In State v. Bybee, 17 Kan. 462, the court said to the jury that they ought, by compromise and surrender of individual opinion, to agree, and that failure to do so would be an imputation on court and jury. In an opinion written by Judge Brewer the court presented its reasons for reversing the judgment in part, that while the court might call the attention of the jury to many matters that rendered an agreement desirable, such as time already taken, improbability of securing additional testimony, the general public benefit in a speedy close of a litigation. the question of expense to parties and the public, yet no juror should be influenced to a verdict by fear that failure to do so would be regarded by the public as reflecting upon either his intelligence or his integrity.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENCY.—In Fowles v. Briggs, decided by the Supreme Court of Michigan, it was held that where a lumber company loads a car with lumber and delivers it to a railroad company which fails to inspect the load, and afterwards the lumber shifts and kills an employee of the railroad company, the lumber company is not liable. The court says in part: "The deceased had no contract relations with the defendants, and, if his representative has a right of action based upon defendants' negligence, it must rest upon a duty owed to deceased in common with all other employees of the Flint & Pere Marquette Railroad Company, or other road over which the car in question might ultimately be shipped; in short, a breach of a duty owing to the public. An accurate statement of this duty is: 'If a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence.' Whart. Neg. § 437. Yet, as stated by the same author, the confidence must be immediate, or the action fails. In other words, there must be causal connection between the action and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of an independent human agency. *Id.* § 438. In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question; but, before the car came to decedent, it was the duty of the railroad company to provide for the inspection. Here was the intervention of an independent human agency. A leading case is Winterbottom v. Wright, 10 Mees. & W. 109, in which case it was held that the defendant, who had contracted with the postmaster general to provide a mail coach, and keep it in repair, was not liable to an employee of one Atkinson, who had contracted with the postmaster general to provide horses and coachman for the purpose of carrying the mail. See, also, Losee v. Clute, 51 N. Y. 495; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. Rep. 400; Loop v. Litchfield, 42 N. Y. 351; Roddy v. Railway Co. (Mo. Sup.), 15 S. W. Rep. 1112. In Necker v. Harvey, 49 Mich. 519, 14 N. W. Rep. 503, the leading cases on this point are cited with approval by Mr. Justice Cooley. Plaintiff seeks to bring this case within a line of cases cited creating an apparent exception to the rule stated; but we think these cases may be all classed as coming under one of three heads: First, as in Johnson v. Spear, 76 Mich. 139, 42 N. W. Rep. 1092, where the fault was not keeping defendant's premises in a suitable and safe condition; or, second, as in Roddy v. Railway Co., *supra*, where the defendant reserves the right to direct the manner of work, or undertakes to supply the instrumentalities. Of this class is also Elliott v. Hall, 15 Q. B. Div. 315, relied upon by plaintiff, in which case it was said by the court that 'the defendant had entire dominion over the track' which caused the injury,—a fact which distinguishes the case from the present. Cases belonging to a third class, more closely analogous to the case under consideration, have arisen where the shipper of a dangerous substance, the character of which is not made known to the carrier, has been held liable. But liability in this class of cases has been limited to instruments and articles in their nature calculated to do injury. Davidson v. Nichols, 11 Allen, 514. We think the case of Chapman v. Refining Co., 38 Hun, 637, and 108 N. Y. 638, 15 N. E. Rep. 442, which counsel for plaintiff cite as fully sustaining their contention, is clearly distinguishable from the present case. The statement of facts in that case is found in 129 N. Y. 601, 29 N. E. Rep. 829, from which it appears that the defendant corporation was engaged in constructing some oil tanks on the line of the Lake Erie & Western Railway Company, at a place called Dick's Switch. The employees of defendant left a car of lumber, after it had been delivered to defendant, and partly unloaded, in such unsafe condition that a portion of the lumber fell upon or was blown upon the track of the railroad company, causing the derailment of the engine operated by the plaintiff. It will be seen that the defendant had complete control over the partly unloaded car, and whatever duty was owing was owing by defendant. In the present case the defendant had parted with the control of the car. The railroad company owed the duty to decedent of causing an inspection or of providing a rule for inspection. We think the circuit judge was right in his holding."

RES JUDICATA—JUDGMENT BY DEFAULT—ACTION FOR DAMAGES.—It is held by the Supreme Court of Minnesota, in Jordahl v. Berry, 75 N. W. Rep. 10, that a judgment by default in action by a physician against his patient to recover for professional services is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services. The following is from the opinion of the court: "While the doctrine of estoppel by a former adjudication is as old as the law, few questions have given rise of late years to more discussion and conflict of opinion than the applicability of the doctrine to a state of facts the same or similar to that presented by this case. In Bellinger v. Craigue, 31 Barb. 534, Gates v. Preston, 41 N. Y. 113, and Blair v. Bartlett, 75 N. Y. 150, it was held that a judgment in justice's court in favor of a surgeon for professional services was a bar to any action against him for malpractice in the performance of such services. In the first and last of these cases the defendants appeared and answered, but afterwards withdrew their answers. In the other the defendant did not answer, but consented in writing to the entry of the judgment. We do not refer to this as distinguishing in principle those cases from the present, but it may have had some influence upon their decision. See Bascom v. Manning, 52 N. H. 132. Neither do we lay any stress on the fact that an action for services is brought in justice's court, except so far as it illustrates the inconvenience and practical injustice of what we may call the New York doctrine. In Dunham v. Bower, 77 N. Y. 76, the court applied the same rule to a state of facts not differing in principle. A directly opposite conclusion was arrived at upon the same state of facts in Ressequie v. Byers, 52 Wis. 650, 9 N. W. Rep. 779; Lawson v. Conaway, 37 W. Va. 159, 16 S. E. Rep. 564; Goble v. Dillon, 86 Ind. 327, and Sykes v. Bonner, 1 Cin. R. 464, in most of which the courts reviewed the New York cases, and refused to follow them. This conflict of opinion among the courts gave rise to an extended and somewhat energetic dispute among text writers. Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong. Bigelow, Estop. (5th Ed.), p. 174 *et seq.* Mr. Van Fleet takes the same side of the question. Van Fleet, Former Adj. § 168 *et seq.* Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York, as being much better supported by legal reason, and the best considerations of convenience and justice. 2 Black, Judgm. § 769. Mr. Browne, in his note to Ressequie v. Byers (Wis.), 38 Am. Rep. 778, 9 N. W. Rep. 779, says of the New York doctrine, that, while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are odious at best, and are founded on a technicality, and probably promote more injustice than they prevent. On the other side, Mr. Herman urges with great earnestness that the New York doctrine is sound, and that the courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res adjudicata* is founded. Herm. Estop. § 231 *et seq.* We do not find that Mr. Freeman, in his work on Judgments, anywhere discusses this precise question; but in view of the fact that, in support of certain general propositions laid down in his text, he cites the New York cases without any intimation of disapproval, it may perhaps be inferred that he approves of their doctrine. See Freem. Judgm. § 282. On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea. The foundation principle upon which the doctrine of *res adjudicata* rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate. Rightly understood, no doctrine of the law is more in accord with justice and public policy. The difficulty which has always confronted the courts is to determine the extent of the application of that doctrine. Where an issue has been actually litigated and determined on its merits, there can be no doubt, upon either reason or authority, that the judgment is, as between the parties and their privies, conclusive in relation to that point in any other suit, though the purpose and subject-matter of the two suits be different. The difficulty is to determine what points were in issue and determined by the judgment, or, rather, what issues were necessarily involved in the judgment, although not directly and expressly made and litigated. The American authorities seem to have generally gone somewhat further in applying the doctrine of *res adjudicata* in that respect than the English courts, whose general tendency is to confine the estoppel of a judgment to matters actually disputed. Looking at the subject from a practical standpoint, there is certainly great danger of working injustice, unless great caution is used, in holding that a judgment is an estoppel upon a certain point, on the ground that it was necessarily involved in the judgment, although the issue was not expressly tendered and litigated. Frequently one learned in the law can reason out, to his satisfaction, that a particular point was necessarily involved in a judgment, when such a thing would never occur to the ordinary layman. The present case is an illustration of the fact. Whatever conclusion hard logic would require, every one knows that, as a matter of fact, the question of defendants' malpractice was not determined in their suits for services, and that the judgments

were in fact for the value of the services, irrespective of, and disconnected from, any claim for malpractice. The inconvenience of the New York rule, and its liability to work injustice, is further illustrated by the present case. It furnishes an opportunity to create an estoppel by what may not unfairly be called a snap judgment. It is perhaps not uncharitable to surmise that this may have been the very object of defendants in bringing their actions in justice court. But, this aside, if plaintiff had appeared and defended those actions, he would have been put to the alternative of alleging the malpractice as a mere defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could only have recovered $100, the limit of the justice's jurisdiction, and could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claims of the defendant for services were less than $15, the issue involving a claim of $5,000, would have been conclusively determined by the judgment of the justice, from which neither party could appeal on the facts. We concede that such considerations are not, in themselves, of any force, except as illustrating the inconvenience of such a rule; but where it is open to the court, upon principle, to choose between two rules, they are entitled to weight. After starting out with the conceded proposition that a judgment is conclusive of every fact necessary to uphold it, whether the final determination is the result of litigation, or a default of one of the parties, the reasoning of those who advocate the New York doctrine may be all summed up as follows: If the services were of value, they could not have been useless; and, if of use, they could not have been harmful; and, if not harmful, there could not have been malpractice in the performance of them; therefore a judgment that the services were of value necessarily involved a determination that they were properly performed; and that such an adjudication is necessarily inconsistent with the existence of a claim by the patient for damages for malpractice in their performance. See Blair v. Bartlett, *supra*, and Dunham v. Bower, *supra*. We cannot avoid feeling that this line of reasoning is more technical and theoretical than practical. And, even if technically sound, the doctrine of many of the adjudicated cases certainly does not conform to it, as is illustrated in numerous suits between vendor and vendee and employer and employee. The decisions are too numerous to require citation, to the effect that in the case of a sale of personal property, with a warranty of its quality, a judgment in favor of the vendor for the purchase money (the breach of warranty not having been interposed by way of defense or counterclaim) is no bar to an action by the vendor for damages for breach of the warranty. We fail to see why the reasoning adopted in favor of the New York doctrine is not equally applicable to such a case; for, if the property was not as warranted, the contract was broken, and the vendor was never entitled to the full purchase price. It is no sufficient answer to say that the warranty was itself a contract collateral to the contract of sale. There is but one contract, and the warranty is one of its terms and not a separate and independent contract. Thompson v. Libby, 34 Minn. 374, 26 N. W. Rep. 1. There are also numerous cases holding that a recovery by an employee on a complaint for services rendered will not estop the defendant employer from recovering damages sustained by him through the negligent or unskillful performance of such services; such negligent acts not having been set up or litigated in the action for the services. The following are a few of the many cases that might be cited to that effect: Mondel v. Steel, 8 Mees. & W. 858; Rigge v. Burbidge, 15 Mees. & W. 598; Davis v. Hedges, L. R. 6 Q. B. 687; Davenport v. Hubbard, 46 Vt. 200; Minnaugh v. Partlin, 67 Mich. 391, 34 N. W. Rep. 717; Robinson v. Crowninshield, 1 N. H. 76. Mr. Freeman himself lays down this doctrine, and cites some of those cases in its support. Freem. Judgm. § 282. In Schwinger v. Raymond, 83 N. Y. 192, the New York court of appeals held the same thing. It is true, the court attempted to distinguish that case from Dunham v. Bower, *supra*, on the ground that in the latter the carrier had never performed his contract, by transporting and delivering the goods, which were wholly destroyed *en route*, while in the former the carrier had performed by transporting and delivering the goods, which were only damaged *en route*. But it is respectfully suggested that the distinction is untenable on principle. In both cases the contract was to safely carry and deliver the property, and in neither was the contract performed. The difference in breach was one of degree merely. The reasoning adopted in support of the New York doctrine is equally applicable to all these cases; for it could be argued that an adjudication that the employee was entitled to recover for his services necessarily implied that he had performed them properly, and according to the contract, which would be inconsistent with the existence of a claim in favor of the employer for damages for the improper or negligent performance of the services."

PARTNERSHIP LIABILITY OF THE STOCKHOLDERS OF "TRAMP" CORPORATIONS.

The common law imposes no individual liability upon a stockholder for the torts or contracts of the corporation, beyond the amount of his unpaid subscriptions to the stock.[1] This remains the law in several of

[1] Cook on Stocks & Stockholders, § 212.

the American States, but in most of them there are statutory provisions by which the stockholder is subjected to an additional liability. Thus, in a number of the States, it is provided that each stockholder shall be liable, over and above his stock, in a further sum equal in amount to such stock. As a result of this inequality in the state of the law in different jurisdictions, it is a common practice for citizens of a State in which the extended liability exists, to incorporate themselves under the laws of some State more liberal toward the stockholder, in order to escape individual liability for the debts of the corporation, though the only object and purpose of the incorporation is the transaction of business without the limits of the State in which the charter was obtained, and within the State in which the corporators reside. Such organizations have been humorously, but not inaptly, styled "tramp" corporations; a term, however, not necessarily one of reproach, as some of the strongest and most important manufacturing, commercial, and financial institutions in this country belong to that category. The provisions of the laws of the State of West Virginia have generally been considered more liberal toward the stockholder than those of any other State, and to such an extent has that State been patronized by every possible description of disembodied enterprise, that the term "West Virginia corporation" has become a part of the common parlance of the business world. We propose to consider briefly in this article the following question: "Whether the citizens of a State in which stockholders are made individually liable for the debts and obligations of the company, and in which the business of the company is to be exclusively carried on, will incur a liability as partners by going into a State whose laws exempt the stockholder from such liability, obtaining a charter under those laws, and returning thence to the State of their domicile, there to carry on the business of the corporation." After a careful examination of the digests and reports we have been able to find but few cases in which this question has been directly considered. Those cases, together with others not precisely in point but bearing strongly upon the question, we have arranged below in chronological orders: first, those supporting or tending to support the partnership liability theory; and, then, those opposed to that view.

Cases Supporting the Partnership Theory. —Hill v. Beach[2] (1858). This is the first case in which the question we are now considering was raised. Citizens of the State of New Jersey (it seems) procured a charter for the Belleville Quarry Co. under the laws of the State of New York, for the purpose of operating a quarry in New Jersey. The company became insolvent and a bill was filed against it and the incorporators by a creditor. The court held that the incorporation under the laws of New York, for the purpose of operating in New Jersey only, was a fraud upon the laws of the latter State, and therefore null and void, but that the incorporators would be treated, either at law or in equity, as partners trading as the "Belleville Quarry Co." "If," said the court, "the company can be recognized as a legally constituted corporation, what need is there of any general or special law in our State? Individuals, desirous of carrying on any manufacturing business, may go into the city of New York, organize under the general laws of that State, erect all their manufacturing establishments here, and under their assumed name, transact their business, not only free from all personal responsibility, but under cover of a corporation not amenable to our laws." Speaking of the incorporators: "These individuals, then, must be treated and dealt with by the law as partners trading under the name they have assumed. Although their object in taking the name they did was to avoid personal responsibility, the law will not allow them so to escape. A court of equity as well as a court of law will treat them as partners." Montgomery v. Forbes[3] (1889). In this case the defendant, a resident of the State of Massachusetts, went to New Hampshire, and there executed and filed certain papers for the purpose of

[2] 12 N. J. Eq. 31. This case was thus explained in Merrick v. Van Santvoord, 34 N. Y. 208: "It is true, as the chancellor of New Jersey held in the case of Hill v. Beach, that when parties in one State engage in a joint enterprise and adopt a partnership name, they cannot evade personal responsibility by incorporating themselves in a similar name under the general statutes of another State; but the ground of the decision was, not that the corporation migrated to New Jersey, but that it never existed in New York, where its inception was utterly void, as a flagrant fraud upon the law.

[3] 148 Mass. 249.

forming a corporation under the laws of that State, for the reason that its tax laws were more favorable than those of Massachusetts, and because he desired to avoid personal responsibility. The whole business of the company was to be carried on in the State of Massachusetts, and these steps were taken to avoid the laws of that State. The defendant was adjudged to be personally liable on the contracts of the company; but the decision seems to have been founded, to some extent, on the fact that the terms of the New Hampshire law had not been complied with in procuring the charter. There were four other members of the company beside the defendant. They were citizens of the State of New Hampshire; mere dummies whose signatures were procured in order to have the requisite number of incorporators. Taylor v. Branham[4] (1895). Here the defendants, who were sued as partners, were incorporated under the laws of Tennessee as the Florida Hedge Fence Co., and they pleaded that fact in abatement. It appeared that they had organized by the election of officers at their place of business in the State of Florida, and that they carried on their entire business operations in that State, but it does not appear from the report whether the charter members were or were not citizens of Florida at the time of the incorporation. There was a judgment against the defendants as partners, and this judgment was affirmed on appeal. These decisions were rested largely upon several early cases which decide that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. That it exists only in contemplation of law and by force of the law, and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. The earliest of these cases was that of Bank of Augusta v. Earle[5] (1839). In this case the plaintiff, Bank of Augusta, a Georgia corporation, doing business and having its principal office in that State, purchased, through its agent, a bill of exchange in the city of Mobile, Ala. The bill was dishonored, and the bank of Augusta brought suit against one of the parties in the State of Alabama. The defense was that the plaintiff, being a foreign corporation, had no power to carry on its operations in the State of Alabama by the purchase of a bill of exchange there. It was also contended, as a matter of law, that a corporation of one State could do no commercial business, nor enter into any contract in any other State than that from which it received its charter. Judgment was rendered for the defendant at the circuit, but this was reversed on appeal by the Supreme Court of the United States. Chief Justice Taney, in delivering the opinion of the court, said, that while a corporation could have no legal existence out of the boundaries of the sovereignty by which it was created, and could not migrate to another sovereignty, yet it was not thereby prevented from entering into contracts in another State and that the comity existing between the States permitted the recognition of the foreign corporation, and the enforcement of its contracts in the courts of such other States. Miller v. Ewer[6] (1847). In this case it was held that the proceedings of a meeting of corporators held beyond the boundaries of the State granting the charter, were void. The court said: "It (the corporation) may maintain a suit without those limits, but that does not imply its existence or presence there. It may also contract without those limits. Being within them, it may, acting *per se*, by vote transmitted elsewhere, propose a con-

[4] 17 South. Rep. 552 (Florida case).

[5] 13 Pet. (U. S.) 587. See also Runyan v. Foster, 14 Pet. (U. S.) 129; Christian Union v. Yount, 101 U. S. 352; Hillis v. Parish, 14 N. J. Eq. 380. The removal of the principal place of business of a corporation to another State, and the performance of all of its corporate acts there, seems to have been held a "migration" of the corporation in the sense contemplated by the *dictum* of Chief Justice Taney in Bank of Augusta v. Earle, *supra;* Aspinwall v. Railroad Co., 20 Ind. 492. The fact that the books and records of a Florida corporation were kept in the State of Massachusetts, and that its president and other officers resided there, was held not to divest it of its character as a foreign corporation. Danforth v. Penny, 3 Metc. (Mass.) 564. A suit by or against a corporation in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a federal court. Ohio & Miss. R. Co. v. Wheeler, 1 Bl. (U. S.) 286. See also Aspinwall v. Railroad Co., 20 Ind. 492. While corporations cannot migrate from one sovereignty into another, so as to become legal, local existences within the latter sovereignty, the migration of directors of a corporation does not terminate the existence of the corporation within the sovereignty which created it Wright v. Bundy, 11 Ind. 398 (1858); Miller v. Ewer 27 Me. 509. But see Hillis v. Parish, 14 N. J. Eq. 380.

[6] 27 Me. 509.

tract, or accept one previously offered." To the same effect is Freeman v. Mill Co.[7] (1854). Land Grant Ry. & Trust Co. v. Coffey[8] (1870). The question in this case was, whether a corporation created under a special act of the Pennsylvania legislature, which excluded the corporation from the transaction of business in that State, could have a legal existence in the State of Kansas, where its principal business was to be carried on. This question was decided in the negative. Incidentally the court said: "A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the State which creates it. It may send agents into other States to do business, but it cannot migrate in a body. If it attempts to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals. And even where a corporation has a legal and valid existence in its own State, the only recognition that other States will give to it is such as the rules of courtesy and comity between States require."

Cases Denying the Partnership Theory.—The first of these cases is that of Merrick v. Van Santvoord[9] (1866). This was a case in which a corporation chartered in the State of Connecticut by citizens of that State, transferred its business operations exclusively to the State of New York, merely holding its annual meetings for the election of directors in the State of Connecticut. A stockholder and officer of the corporation was sued in the State of New York, where he resided, on a cause of action against the corporation arising in that State, and a judgment was rendered against him on the ground that the company had lost its corporate character by migrating to the State of New York, that the stockholders were to be treated as partners, and the defendant held liable as such to the plaintiff. This judgment was affirmed by the supreme court,[10] but was reversed by the court of appeals; the latter court holding that stockholders in a foreign corporation are not personally liable in another jurisdiction, either for its debts or its torts, unless such liability is imposed by the terms of its charter, or in virtue of some positive law. The court did not consider their ruling in conflict with the proposition that a corporation cannot migrate, announced in the case of Bank of Augusta v. Earle, *supra*. "We think," said they, "the effect of this *dictum* has been misapprehended, and that the true import of the observation of the chief justice is, not that a corporation is capable of migration, and of thereby forfeiting its rights, but that in its nature, as an artificial creation of law, it is utterly incapable of migration, and must be deemed to retain its domicile in the jurisdiction from which its being is derived." Second National Bank v. Hall[11] (1878). In this case the defendants, some of whom resided in the State of Ohio, and some in the State of Kentucky, organized a corporation under the laws of Kentucky for the purpose of mining coal in the State of Ohio exclusively. They were sued as partners on the ground that they had organized under the laws of Kentucky to escape individual liability as stockholders under the laws of Ohio. This intent was not proven, and there were circumstances tending to show other reasons for organizing under the laws of Kentucky, but the court seems to decide that if such intent had been proven, the defendants could not be held liable as partners. Demarest v. Flack[12] (1891). This was a suit against individual stockholders to recover damages against them as partners for a tort committed by the company. The company was chartered under the laws of the State of West Virginia by citizens of the State

[7] 38 Me. 343.

[8] 6 Kan. 245.

[9] 34 N. Y. 208. The case of Kruse v. Dusenberry, 19 Wkly. Dig. (N. Y. Com. Pl.) 201 (1884), a decision of a court of first resort, is in conflict with this case and with the later decision of Demarest v. Flack, 128 N. Y. 205, and is therefore entitled to no weight in that State. So also the *dictum* of Denio, J., in Bard v. Poole, 12 N. Y. 495, 507 (1855). "I concede that it would be a violation of our sovereignty for a foreign corporation to remove from the county or State where it was created to locate itself wholly in this State."

[10] 38 Barb. (N. Y.) 574.

[11] 35 Ohio St. 158, 2 Cin. (Ohio) 397.

[12] 128 N. Y. 105. Approved and reaffirmed as declaring the law in New York, in Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576 (1894), where it was held that a purchaser could not object to a title on the ground that the vendor was a foreign corporation composed of citizens of one State who were incorporated under the laws of another State, for the purpose of transacting business exclusively in the home State. The fact that the incorporators were citizens of another than that in which it was chartered, and had its principal office and conducted its business there, did not affect the validity of its organization.

of New York, for the purpose of conducting a place of amusement in the city of New York, The court repudiated the idea that the procuration of a charter under the laws of a foreign jurisdiction, was a fraud upon the laws of the State in which the incorporators resided and in which they intended to do business. The decision would be directly in point but for the fact that the same degree of immunity from individual liability on the part of the stockholders for the debts of the concern, might have been attained under a home charter as under the laws of West Virginia. It is obvious that the incorporators deemed the laws of the latter State more liberal toward them than the laws of New York, but the court found nothing to deprecate in that fact. "If," said they, "in any particular case it is thought by those interested in the matter that the business can be done in our own State and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form." Oakdale Manfg. Co. v. Garst[13] (1894). In this case, the court deciding that it was not against the laws or policy of the State of Rhode Island for the citizens of that State to form a corporation under the laws of another State to do business exclusively in their home State, said: "While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business and violates no law of this State we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders given to creditors under our statute are wanting, but that is a matter for those who deal with the corporation to consider."

Text-writers' Views.—Of the text-writers, Angell & Ames,[14] adopting the *dictum* of Chief Justice Taney in Bank of Augusta v. Earle, *supra*, lay down the rule that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty. But this text seems to have been prepared in 1831, and at that time there was no decision by any court upon the question of the partnership liability of the incorporators of a company under the circumstances proposed in this article. Judge Seymour D. Thompson, in his recent Commentaries on the Law of Corporations,[15] takes strong ground in favor of such liability. After considering the question at some length, and criticising the cases of Merrick v. Van Santvoord and Demarest v. Flack, *supra*, he says: "The conclusion is that the 'tramp corporation' should not be judicially recognized, but that its members should be held liable upon their contracts as partners, and upon their torts as joint tort-feasors." Such, also, seems to be the opinion of Mr. George A. D. Ernst, in an article of considerable force contributed by him to the *American Law Review*.[16] On the other hand, Mr. Morawetz, in his work on Corporations,[17] and Mr. Cook, in his work on Stockholders,[18] writers of acknowledged authority, who have had the benefit of all the recent decisions upon the point we are considering, adopt the view of the courts of the State of New York in Merrick v. Van Santvoord and Demarest v. Flack, *supra*, and declare the law, as there announced, to be settled by the weight of authority in the United States. The writer submits, with great diffidence, the opinion that there is no tenable ground for imposing a partnership liability upon home citizens who become stockholders in a corporation chartered elsewhere, for the purpose of evading individual liability under home laws, and offers the following reasons in support of his views:

(1) *The doctrine of partnership liability contended for, is an innovation upon the common law, and is unsupported by any semblance of a contract, express or implied, between the stockholder and those who deal with the corporation.* It is true that the charter members or incorporators of a

[13] 28 Atl. Rep. (R. I.) 973.

[14] Private Corporations (11th Ed.), § 104.

[15] Vol. 6, § 7895. Another reason assigned by Mr. Thompson for his view is, that inasmuch as the law conclusively presumes that a suit by or against a corporation in its corporate name, is a suit by or against the citizens of that State which created the corporate body, the effect of an incorporation under the laws of another State is to cheat the courts of the home State out of their jurisdiction, and upon that ground all such corporations should be treated as partnerships. It is conceived that some difficulty would be encountered in reaching this result in a federal court, which had taken jurisdiction of a suit by or against a "tramp" corporation.

[16] Vol. 25, p. 352.

[17] Vol. 2, § 748.

[18] § 237.

corporation, organized in a lawful manner for the purpose of conducting an illegal and fraudulent business, have been held liable as partners for the debts of the company.[19] But it is obvious that the reasoning which leads to that result could have no application to a case in which a lawfully organized corporation conducts a lawful business in a lawful manner. And in some cases it has been held that the incorporators of an invalid or defectively organized corporation will be held personally liable, as partners, for the debts of the concern, but the weight of authority seems to be clearly in favor of the opposite view.[20]

(2) *The partnership liability, imposed by the doctrine under consideration, would be infinitely greater than the stockholder's individual liability under the statutes which, it is claimed, he seeks to avoid.* In other words, an incorporator who takes one share of stock, par value $100, in a corporation organized elsewhere, would not only, after paying up his stock in full, become personally liable for the debts of the company to the extent of $100, but he would become personally liable for every obligation of the company, or cause of action against it, of any kind whatever, thereby forfeiting, possibly, a large estate for a trifle. It is inconceivable that the law intends such a result. Surely there can be no reason for imposing upon the incorporator a greater liability than he would incur by organizing under the home laws.

(3) *The partnership liability would attach not only to the charter members of the company, but to all who afterwards acquired its stock, either by subscription or transfer.* Assuming that the charter members, or projectors, or incorporators of the company are to be treated as partners or conspirators, there would seem to be no just reason why the forfeiture should be extended to innocent parties whom they had induced to take stock by transfer or subscription. Yet there is no middle-ground. The concern is either a corporation or a partnership. It cannot be a corporation as to one set of persons, and a partnership as to another set. It cannot be a corporation for one purpose, and a partnership for another purpose.[21] But what court would fix upon the purchaser of a share of stock at $10, a liability, as partner, by reason of that purchase, for $100,000?

(4) *Creditors are presumed to know with whom they are dealing, and if they extend credit to a foreign corporation they should be estopped to claim that it was organized for the purpose of evading home laws.* The general rule is that a creditor is estopped to deny the valid organization of the corporation with which he has dealt.[22] The rule applies with great force to the case under consideration. Creditors are presumed to know under what law the corporation was organized, and the nature and extent of the liability of the stockholders, and the duties of the corporate officers. If they choose to extend credit to a company whose stockholders are liable only to the extent of their unpaid subscription to stock, there is no just cause for complaint in the fact that the stockholders organized in such way as to limit their individual liability. They would have no more ground for complaint than they would have in a case in which they had extended credit to a partnership in which the liability of some of the partners had been limited to a certain sum in the manner provided by law.

(5) *The remedy for any of the inconveniences resulting from the present state of the law, lies with the legislature.* It is not to be denied that many irresponsible concerns are launched upon communities under foreign charters which exempt the stockholders from individual liability for the debts of the company. One of the most common abuses of the law is the reorganization of commercial failures as corporations under the liberal laws of some other State — John Doe fails for $100,000. In a couple of weeks we have "The John Doe Company," with John Doe as president or general manager, and his book-keepers, clerks and salesmen posing as board of directors, while the bulk of the stock is issued to the members of John Doe's family, or to his business friends, all sailing under a charter and laws which impose no liability upon the officers or stockholders, beyond the amount of their unpaid stock. It is believed that such and other abuses of the law would be effectually remedied by some such provision as this: "Every corporation

[19] McGrew v. City Produce Exchange, 85 Tenn. 572; Rinehard v. Horey, 13 Ohio, 166.

[20] 2 Morawetz on Corporations.

[21] Merrick v. Van Santvoord, 34 N. Y. 208.

[22] Second Nat. Bank v. Holt, 35 Ohio St. 158.

or joint-stock company incorporated by citizens of this State under the laws of some other State, for the purpose of carrying on its principal business in this State, shall, with respect to the individual liability of such of its stockholders as are residents of this State for the debts of the corporation, be deemed and held to be a corporation of this State." There is no doubt as to the power of the legislature to prescribe terms upon which foreign corporations shall be permitted to do business in the State. But so long as they prescribe no such terms, and so long as the comity between the States requires that the corporations chartered by the one shall be recognized by the others, and so long as creditors having knowledge of the law, put all such concerns on an equal footing with home corporations, by freely extending them credit, there seems to be no reasonable ground upon which to impose upon the stockholders a liability utterly at variance with the legal nature of their undertakings, and to the last degree harsh and inequitable.

CHAPMAN W. MAUPIN.

Washington, D. C.

RESCISSION OF CONTRACT — SALE OF LAND — LACHES.

THOMAS v. MCCUE.

Supreme Court of Washington, May 5, 1898.

1. One who pays money on a contract cannot recover the same unless he is entitled to a rescission of the contract.

2. The rescission of a contract is a remedy to be applied in the sound discretion of the court, and only he is entitled to it who can show that he is without fault, and that the other party is derelict.

3. A contract for the sale of land will not be rescinded at the suit of the vendee because the vendor has incapacitated himself either from conveying the entire tract bargained for or conveying it free from incumbrance, where the vendee did not promptly take action to rescind upon discovery of the breach.

ANDERS, J.: On February 1, 1890, the respondents and the appellant entered into a contract in writing, wherein and whereby the former covenanted to sell and the latter to purchase a certain tract of land in the county of Whatcom, and State of Washington, described as lots Nos. 4 and 5, and the W. 1-2 of the S. W. 1-4 of section 27, township No. 38 N., of range No. 3 E., containing 159.50 acres. The appellant agreed to pay for the same in the following manner: $2,000 in cash to be paid on or before 30 days from date, $9,472.18 on or before one year from the date of said first payment, and $9,472.18 on or before two years from the date of said first payment, together with interest thereon at 8 per cent. per annum from date. The appellant was, by the contract, constituted an attorney in fact of the respondents to dedicate to the public any plat that he or his assigns might lay on the land at his own expense, the manner of such platting being left to the judgment of appellant. The respondents reserved the right to retain one-eighth of the number of lots laid out in each block, with a proportionate number of corner lots, and as a part of said one-eighth they also reserved the right to 100 feet square at the mineral springs on said land, to be selected so as not to interfere with streets laid out, if possible. It was also provided that the appellant should, at any time after the payment of said $2,000, have a right to a deed to any block that was not on the water front, and not reserved by the respondents, on paying therefor at the rate of $300 per acre, and that appellant might deduct from the last payment the amount then due to the Guarantee Loan & Trust Company on a mortgage then on said premises. Respondents also reserved the privilege of occupying the house and meadow for themselves, if they so desired, for a period of one year from the date of the contract. The appellant was also to pay all taxes or assessments thereafter levied or imposed upon the premises. In regard to performance and payments the contract contained these provisions: "Whereas, it is the intention of the parties hereto and they hereby covenant and agree that the times mentioned for the performance or the payment of the said sums and interest thereon, as specified, is essential herein, and that no estimate can be made of the damage which would accrue to said obligors by default in the performance thereof at the stated times, and whereas it is hereby mutually covenanted and agreed, in consideration of the premises, that default either in the payments, the whole or any part of said unpaid purchase money, with interest thereon promptly, according to the time above mentioned, or default in the payment of the taxes or assessments aforesaid at their maturity, shall in and of itself, without notice and without proceeding in any court, work a forfeiture of all money paid, and of all rights of the property or possession of, in, or to said premises, or any part thereof, or improvements thereon, at law or in equity: Now, therefore, if said John H. Thomas or his assigns shall pay each and all of said payments with interest thereon at maturity, and shall in the meantime pay all taxes on said premises; and the said Henry McCue shall, on the completion of said payments, make, execute, and deliver or cause to be made, executed, and delivered, a good and sufficient warranty deed to the said John H. Thomas or his assigns for said property, or for said block or blocks, as above set forth, then this obligation to be void; otherwise to remain in full force and virtue,"—the agreement being in the form of a bond on the part of the respondents. This contract was recorded in

the office of the county auditor of Whatcom county on the day of its execution. Within a very short time thereafter Cannon and Steele instituted an action in the superior court of Whatcom county to obtain a decree declaring them to be the real owners of the contract, and appellant their trustee. This action, it appears, was not brought to trial, and was dismissed on March 21, 1891. After the commencement of this action, and on May 29, 1890, the respondents brought an action against the appellant to have the contract rescinded and declared a cloud upon their title, and then removed, on the ground that the appellant had, by fraudulent misrepresentations as to certain facts, overreached them in the contract. A *lis pendens* was filed in the case by the plaintiffs. This action was continued from time to time, and was finally dismissed, and the costs paid by the respondents on January 4, 1893. Prior to that time, and on March 25, 1892, the respondents sold and conveyed to the Bellingham Bay & Eastern Railroad a right of way over a portion of lot 5, consisting of about three acres. On April 12, 1893, the respondents instituted another action against the appellant for the purpose of obtaining a judgment for the amount of the last installment of the purchase price and interest, and asked that such judgment be made a lien on the appellant's interest in the land mentioned in the contract; and on the 4th of May following judgment was rendered against the appellant by default for the amount found due. Execution was subsequently issued thereon, and the land sold by the sheriff, and bid in by the respondent Henry McCue for the amount of the judgment and costs, and said judgment was thereupon satisfied of record. On February 28, 1890, appellant paid the first installment of the purchase price, being $2,000, by depositing the same in the Bellingham Bay National Bank of Schome, in accordance with the terms of the contract, and on December 28th of the same year he paid the taxes then due on the land. On March 3, 1891, he deposited the amount of the second installment in said bank to the credit of Henry McCue. He did not at any time plat the land into lots and blocks, nor did he pay, or offer to pay, the balance of the purchase price due February 28, 1892; but he paid the taxes due on the land in the years 1893 and 1894. Nothing further was done by appellant in relation to the contract until January 29, 1896, at which time he delivered to the respondent Henry McCue a quitclaim deed to the land, on condition, as he alleges in his complaint, that the latter would repay to him the amount of the purchase money and taxes paid under the contract, together with interest thereon to date. At the same time he demanded of McCue the payment of $18,000 as damages. These demands were not complied with, and appellant, on the following day, commenced this action, the purposes of which were, as stated in his brief (1) to rescind the contract between himself and the respondents, and incidentally to vacate the judgment against him of May 4, 1893; (2) to foreclose a vendee's lien; and (3) to recover the sum of $25,000 damages for the violation of the written agreement. He set up in his complaint that the respondent Henry McCue, with intent to cheat, defraud, and swindle the plaintiff, represented to him that the land above described, and every part thereof, was free from all incumbrances of whatsoever kind or nature except a mortgage held by the Guarantee Loan & Trust Company, which representation the plaintiff believed to be true, and relied upon the same; and that at the time of the making of said contract, as the said McCue well knew, the land was subject to an easement granted to the Bellingham Bay Water Company by a deed executed on April 3, 1889. The complaint further stated the facts already mentioned and also that the plaintiff was prevented from further executing the contract by the commencement of the actions against him by the defendants, and the withholding from him of the possession of the land. A demurrer was interposed to the complaint upon several grounds, among which was that it failed to state facts sufficient to constitute a cause of action. The demurrer was overruled by the court and the defendants answered by denying certain portions of the complaint and pleading affirmative defenses. The new matter in the answer was denied in plaintiff's reply and upon the issues joined the cause proceeded to trial by the court without a jury, resulting in a judgment for the defendants, dismissing the complaint at the cost of the plaintiff, and the latter has brought the case to this court for review on appeal.

Counsel for the respondents insist here, as they did in the court below, that the complaint fails to state facts sufficient to constitute a cause of action, and it must be conceded that this contention is not without considerable force. The principal trouble with the complaint is that the pleader undertook to make it too general and comprehensive. If it was intended to bring an action for the recovery of the money paid under the contract, he cannot recover unless it appears from the whole case that he is entitled to a rescission of the contract. Distler v. Dabney, 7 Wash. 431, 35 Pac. Rep. 138, 1119. If it was intended to state a cause for rescinding the contract, then it is at least questionable whether he should not have shown an offer or willingness to perform upon his part. We think, if the complaint states a cause of action at all, it is one for a rescission of the contract in question; and, conceding that the facts stated are sufficient to entitle him to a rescission, the question still remains whether, under the proofs and pleadings, he was entitled to the relief at the time the action was commenced: and we are of the opinion that this question must be answered in the negative. Rescission is a remedy which is not to be invoked as a matter of course or of absolute right, but, like specific performance, its exercise rests in the sound discretion of the court. 2 Warv. Vend. p. 833.

A court of equity, in rescinding a contract, pro-

ceeds upon the assumption that it can result in no injustice to place both parties in the position in which they were prior to the making of the contract; and this can only be fairly done in cases of contracts in relation to land whose value is largely speculative and subject to sudden changes soon after the contract is entered into. Before a party can justly claim a rescission, he must not only show that the opposite party is derelict, but that he himself is without fault, for the law permits no one to take advantage of his own wrong to terminate a contract which he has knowingly and voluntarily made. There is another principle adopted by the courts, and which is often a controlling one in cases like the present; and that is that, where one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of such breach. Delay in rescission is evidence of a waiver of the misconduct of the other party, and is itself deemed an election to treat the contract as valid and binding. Hogan v. Kyle, 7 Wash. 595, 35 Pac. Rep. 399; Scheftel v. Hays, 7 C. C. A. 308, 58 Fed. Rep. 457; Rugan v. Sabin, 3 C. C. A. 578, 53 Fed. Rep. 415; McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. Rep. 29; Grymes v. Sanders, 93 U. S. 55; Hayward v. Bank, 96 U. S. 611. The rule deduced from the authorities in relation to rescission is well stated in 2 Warvelle, Vendors, at page 836, as follows: "Where a party intends to abandon or rescind a contract on the ground of a violation of it by the other, he must do so promptly and decidedly on the first information of such breach. If, with full knowledge, or with sufficient notice or means of knowledge of his rights and of all the material facts, he lies by for a considerable time, or abstains from impeaching the transaction, so that the other party is induced to suppose that it is recognized, this will be an acquiescence, and the transaction, although originally impeachable, ceases to become so in equity." In Hayward v. Bank, *supra*, the court said: "The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. 'A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the meantime varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage.'" Applying these principles to the case before us, it would seem manifestly unjust to the respondents to permit the appellant to rescind his contract, and recover the amount paid thereon. The appellant contends, however, that he is absolved from all obligations under the contract, for the reason that the respondents have incapacitated themselves either to convey the land free from incumbrances or to convey the whole amount bargained for. He insists that he is under no obligation either to accept incumbered property or a less amount of land than that specified in the contract. But, conceding that he would have had sufficient ground for asking for a rescission when he discovered that the land was subject to the right of way to the water company, it was his duty, under the authorities which we have cited, to avail himself of his option at that time. And the same remarks are equally applicable to the objection that the respondents are unable to convey all the land they agreed to convey by their contract. The proof shows that at the time this contract was made the premises in controversy were worth some $200 or $225 per acre; that in April, 1892, the time when the conveyance of the right of way was made to the railroad company, it was worth only about $50 less. In October, when appellant says he first became aware of this conveyance, it was worth $50 per acre, but at the time of the commencement of this action it was worth not to exceed $25 per acre, and not in demand at that. If appellant had asserted his rights when he became aware of the grievances of which he now complains, there would have been an opportunity for the respondents to have sold the land to other parties, and repaid the purchase money without material loss. But at the present time that would be impossible, and a rescission would entail upon the respondents the loss of many thousands of dollars occasioned by the indecision and inaction of the appellant. The appellant himself testified at the trial that he did not make up his mind to rescind his contract until about a week before he tendered the quitclaim deed to McCue on January 29, 1896. It was then too late to rescind or treat as rescinded the contract which his long silence had ratified. We have carefully examined all of the appellant's assignments of error, and have spared no labor in endeavoring to arrive at a just decision as to the rights of the respective parties to this unfortunate transaction, and we have been forced to the conclusion that the judgment of the court below was right, and it is therefore affirmed.

GORDON, DUNBAR and REAVIS, JJ., concur.

NOTE.—*Recent Cases on Rescission of Contracts.*—Defendant, after ordering goods of plaintiff, complained of delay in shipments, and finally countermanded the order directing plaintiff to ship what stock was made up, and promising to pay the bills when due. Plaintiff accordingly shipped the stock on hand in reliance on the statements in defendant's letter, and on its promise that the goods made up should be paid for. Held, that the contract was rescinded by mutual consent. Sidney Glass Works v. A. S. Barnes & Co., 33 N. Y. S. 508, 86 Hun, 374. Where one who has contracted with another to build a house wrongfully ousts the contractor, and prevents him from completing the work, the latter may treat the contract as rescinded, and can recover on *quantum meruit*. Adams v. Burbank, 103 Cal. 646, 37 Pac. Rep. 640. Where plaintiff's agent, through whom a contract for a loan was made with plaintiff, told defend-

ant he would be unable to procure the loan by a certain time, and advised him to attempt to secure it elsewhere, there was a mutual abandonment of the loan contract, which relieved defendant from liability thereon. Everett v. Farrell (Ind. App.), 38 N. E. Rep. 872. The fact that the owner of a building, upon the statement by a contractor that his failure to prosecute the work was owing to his inability to get mechanics, employed extra men himself, does not show a rescission of the contract by the owner nor cause for rescission by the contractor. McGonigle v. Klein (Colo. App.), 40 Pac. Rep. 465. A party cannot rescind a contract because of a breach occasioned by his own fault. Burris v. Shrewsbury Park Land & Improvement Co., 55 Mo. App. 381. The fact that defendant concealed the fact that he was to receive a commission from the vendor was not ground for the rescission of such contract, defendants having practiced no fraud on plaintiff, and not having taken the other half interest in the contract until after plaintiff contracted to make the purchase, and his original associate therein defaulted. Blewitt v. McRae, 88 Wis. 280, 60 N. W. Rep. 258. Where a building contract provides that if the contractor fail to complete the building as agreed the owner may do so, and deduct the expense from the contract price, the contractor cannot abandon the work, and compel the owner to complete it, and account to him for the balance of the contract price. Bernz v. Marcus Sayre Co., 52 N. J. Eq. 275, 30 Atl. Rep. 21. A contract obtained by duress cannot be rescinded by the injured party without restoring or offering to restore what he has received thereunder. The Ernest M. Munn, 66 Fed. Rep. 356. An agreement approved by the secretary of war between the engineer in charge of a public work and the contractor, that the contractor shall be allowed to throw up his contract, and be paid all money due for work performed, made without concealment, misrepresentation, or fraud, is binding upon the government. Satterlee v. United States, 30 Ct. Cl. 31. A buyer of an insurance agent's business, after paying part of the purchase money and accepting orders, for the balance, notified the seller that he would elect to rescind, as provided by the contract, and demanded return of the money paid. Thereupon the seller demanded return of the business as he had received it, which the buyer was unable to do, and nothing further was done in the matter; but the buyer continued in the business till he sold it to another, making provision for payment of the acceptances. Held, that there was no rescission of the contract, so as to prevent action on the seller's covenant therein not to re-engage in the insurance business. Klein v. Buck (Miss.), 18 South. Rep. 891. Where a contract contains a provision that either party may terminate it upon proper notice, whereupon arbitrators shall be appointed, to determine the terms upon which the contract shall be rescinded and the compensation to be awarded, equity will not entertain a bill to cancel the contract; such bill being, in itself, a violation of the provision for arbitration. Young Lock Nut Co. v. Brownley Manufg. Co. (N. J. Ch.), 34 Atl. Rep. 947. Where a contract for grading obligates defendant to pay for a certain portion thereof as soon as completed, a refusal to do so authorizes plaintiff to treat it as rescinded for the balance. Miller v. Sullivan (Tex. Civ. App.), 33 S. W. Rep. 695. Defendant cannot rescind an agreement for the erection for him of a building with certain lumber to be furnished by plaintiff, because of defects in the lumber which he knew to exist when the agreement was made. Scales v. Wiley (Vt.), 33 Atl. Rep. 771. A party cannot rescind a contract and at the same time retain the consideration he has received. He must put the other party in as good a condition as he was before the contract was made by an offer to return what he has received. Duncan v. Humphries, 58 Ill. App. 440. Plaintiff cannot rescind a contract for the purchase of stock, where defendant, as part of the contract, has resigned his office as treasurer of the company in order that plaintiff might be chosen in his place, and plaintiff has not resigned his office, or done anything toward restoring defendant to his former position. Gassett v. Glazier, 165 Mass. 473, 43 N. E. Rep. 193. A contract which inures to the benefit of a third person may be rescinded by the parties before its acceptance by him. Richards v. Reeves (Ind. App.), 45 N. E. Rep. 624. In the absence of fraud or mutual mistake neither party to a contract has the right to rescind it without the assent of the other. Claes & Lehnbeuter Mfg. Co. v. McCord, 65 Mo. App. 507. Where the circumstances do not justify a court of equity in canceling a contract of a company to supply a borough with water, the borough itself cannot rescind it. United States Waterworks Co. v. Borough of Du Bois (Pa. Sup.), 176 Pa. St. 439, 35 Atl. Rep. 251. Where representations of the assignor of notes secured by mortgage on land in another State, with reference to the land and the notes, were expressions of opinion, and based on information only, and the assignee investigated the value of the land and the notes without hindrance by the assignee, and lived three years after without making complaint, and it was not shown that he did not know that the notes were worthless when he purchased them, his representatives were not entitled to rescind, on the ground of fraudulent representations as to the value of the notes. Brown v. Zachary (Iowa), 71 N. W. Rep. 413. A refusal to instruct that defendant cannot rescind the contract sued on for false representations, if, by reasonable diligence, he could have discovered their falsity when made, or if he failed to rescind within a reasonable time after discovering such falsity, is not error, where the court instructs that a party must always exercise due diligence to protect himself from fraud; that, if due diligence requires him to make an effort to find out if he is defrauded, he must make that effort; and that a party desiring to rescind for fraud must notify the other party within a reasonable time after discovering the fraud. South Milwaukee Boulevard Heights Co. v. Harte (Wis.), 70 N. W. Rep. 821. The fact that a party has not performed his contract even according to its legal effect does not necessarily entitle the other party to rescission, if either or both have partly performed, and circumstances of embarrassment have thereby arisen, which make it impracticable to restore the *status quo*. Blake v. Pine Mountain Iron & Coal Co., 22 C. C. A. 430, 76 Fed. Rep. 624. To rescind a contract because of fraud, plaintiffs, before suing, must offer to place defendant *in statu quo*, by offering to return certain notes surrendered to them as a part of the contract, and to repay, with interest, sums paid out by defendant in compliance with the contract. Breyfogle v. Walsh (C. C. A.), 25 C. C. A. 357, 80 Fed. Rep. 172. Where a suit is brought to rescind an executed agreement because of fraud in procuring it, it will be denied, where no restoration of benefits is made or offered, unless the fraud remained undiscovered until after such benefits had been put beyond the power or control of the plaintiff. Strodder v. Southern Granite Co. (Ga.), 27 S. E. Rep. 174.

BOOKS RECEIVED.

The Life of David Dudley Field, by Henry M. Field. New York: Charles Scribner's Sons. 1898.

Missouri Statute Annotations, Embracing Construction and Derivation Containing the Citations in all the State and Federal Reports of the Revised Statutes and Subsequent Laws, and References to all Enactments of, and Changes in, the Sections of the Revised Statutes, from 1804 to 1897, Inclusive (for use with the Revised Statutes of 1889 and 1899), Together with Notes on the Constitution and References to the New Acts and Amendments in the Session Laws of 1891-1897. By Samuel J. McCulloch, of the Kansas City Bar. Kansas City, Mo.: Published by The Compiler. 1898.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMIRALTY — Maritime Contract.—A contract constituting a person general passenger and freight agent of a steamship, and giving him entire control of her passenger and freight business, is not a maritime contract, and a suit *in rem* in admiralty will not lie for a breach of such contract.—THE HUMBOLDT, U. S. D. C., D. (Wash.), 86 Fed. Rep. 351.

2. APPEAL — Parties.—Where plaintiff demanded and secured judgment jointly against two defendants, and a special finding disclosed that relief was granted for the wrong of both, by which both benefited, one cannot be relieved from making the other a party on appeal on the ground that the latter was not affected by the judgment; and this though he suffered default in the lower court.—MICHIGAN MUT. LIFE INS. CO. v. FRANKEL, Ind., 50 N. E. Rep. 304.

3. APPEAL—Temporary Injunction.—An order of a general term affirming or reversing an order granting or denying a temporary injunction cannot be reviewed by the court of appeals unless it appears from the record that the element of discretion was excluded, or that the injunction was sustained when in fact there was no power to grant it, or was set aside expressly upon that ground.—SCHNEIDER v. CITY OF ROCHESTER, N. Y., 50 N. E. Rep. 291.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—Under Ky. St. ch. 7, § 74, providing that debts due by an assignor as guardian, committee, trustee, or personal representative shall be paid in full before general creditors receive anything, trust funds of an executor due to his *cestui que trust* must be paid before general creditors, although their debts were contracted prior to the passage of the statute, but the assignment was made thereafter.—WEISER v. MUIR, Ky., 45 S. W. Rep. 512.

5. ASSIGNMENT FOR CREDITORS—Corporate Officers—Ratification.—A deed of assignment for benefit of creditors, executed by the president and secretary of a corporation, but not authorized by the board of directors or the stockholders at a duly-held meeting, is nevertheless valid, where it was thereafter sanctioned and ratified by all the directors and stockholders.—MILLER v. MATTHEWS, Md., 40 Atl. Rep. 176.

6. ASSIGNMENTS FOR CREDITORS—Validity—Conflict of Laws.—A voluntary general assignment for creditors is valid in New York, though none of the creditors accepted its terms, and hence is sufficient to pass title to personalty in Texas of an assignor residing in New York.—CARTER BATTLE GROCER CO. v. JACKSON, Tex., 45 S. W. Rep. 615.

7. BANKS AND BANKING — Special Deposit.—A debtor deposited in a bank in New York the amount due from him to a creditor in Helena, Mont. The bank in New York telegraphed the bank of Helena to pay the debt, and charge to it. The bank of Helena refused to pay in any way but by exchange on New York, which the creditor refused to accept, and also refused to permit the amount to be placed to his credit. The creditor then accepted a draft on the New York bank, to be a payment if honored. The bank of Helena suspended, and the draft was not paid. Held, that the refusal of the creditor to accept the draft in payment, or to permit the amount to be placed to his credit, made it a special deposit subject to the law governing such deposits.—MORELAND v. BROWN, U. S. C. C. of App., Ninth Circuit, 86 Fed. Rep. 257.

8. BILLS AND NOTES—Indorser—Partnership.—Where one indorses a note at the request of a member of a firm, and the proceeds are used in the business of the firm, and the indorser has to pay the note, he can recover therefor against the firm.—SPRINGS v. MCCOY, N. Car., 29 S. E. Rep. 903.

9. BILLS AND NOTES — Renewal Note—Defenses.—While the defense of "failure of consideration" is not available to defeat a recovery by the plaintiff in an action upon a promissory note which was in renewal of one previously given for the purchase of personal property, when it plainly appears that this defense is based solely upon alleged defects in the property of which the maker of the note sued on had full knowledge before executing the same, a plea in effect alleging that the renewal note was given to the plaintiff in consideration of a promise by the latter to repair the defects, that this promise had not been performed, and that, in consequence of the breach thereof, the defendant had been damaged in an amount stated, was meritorious.—ATLANTA CITY ST. RY. CO. v. AMER. CAR CO., Ga., 29 S. E. Rep. 925.

10. BOUNDARIES — Grant from State.—A grant by the State, calling for a public road as a boundary, runs to the middle of the same.—COSGROVE v. KINGSTON COAL CO., Pa., 40 Atl. Rep. 151.

11. CARRIERS—Passengers — Negligence.—One who is crossing the track, with a railroad ticket in his pocket,

to board a train, but has not been to the depot, and has not notified the officers or agents of the company that he is a prospective passenger, is not a person to whom the company owes extraordinary care and diligence as a passenger.—SOUTHERN RY. CO. v. SMITH, U. S. C. C. of App., Fifth Circuit, 86 Fed. Rep. 292.

12. CARRIERS—Passenger without Ticket—Expulsion.—An imperative rule of a railroad company forbidding freight conductors to permit passengers without tickets to ride on their trains from ticket stations, and requiring them to collect from passengers getting on freights carrying passengers at non ticket stations fare to the first ticket station only, notifying them to provide themselves there with tickets to their destinations, is reasonable and lawful.—MCCOOK v. NORTHUP, Ark., 45 S. W. Rep. 547.

13. CARRIERS OF PASSENGERS—Agency—Connecting Lines.—A railway company selling a through ticket, with coupons for passage over another road, and limiting its liability to its own line, acts as agent only of the other line, and is not liable for the negligence of the connecting line in transporting a passenger.—MOORE v. M., K. & T. RY. CO., Tex., 45 S. W. Rep. 609.

14. CARRIERS OF PASSENGERS — Assisting Passenger from Car.—A voluntary promise by a conductor to aid a passenger in getting off a railroad car at a certain station does not impose upon the company any liability for a failure of the conductor, after reaching such station, to enter the car and assist the passenger from her seat to the place of exit from such car, where it does not appear that the conductor had any notice of any condition or circumstances of the passenger that would render such assistance necessary.—WESTERN & A. R. CO. v. EARWOOD, Ga., 29 S. E. Rep. 918.

15. CARRIERS OF PASSENGERS—Negligence.—It is not negligence *ipso facto* for a railroad company to operate a freight train with a passenger coach attached, purely for the accommodation of the public, without a conductor.—MEANS v. CAROLINA CENT. R. CO., N. Car., 29 S. E. Rep. 989.

16. CARRIERS OF PASSENGERS—Negligence.—An instruction charged that it was the duty of a railroad company to keep its station platforms in safe condition for the use of passengers. Held that, the company having failed to request the court to explain the legal meaning of the word "safe" in such connection, it could not assign the instruction as error, because it enlarges the liability of the company to that of insurer, and this although it objected to the instruction generally.—ST. LOUIS, I. M. & S. RY. CO. v. BARNETT, Ark., 45 S. W. Rep. 550.

17. CARRIERS OF PASSENGERS—Negligence — Holding Train at Station.—A railroad company must hold its passenger train long enough at a station to permit all its passengers to alight with safety, but without unnecessary delay; and an instruction in an action for the death of a passenger, in alighting from defendant's train, that defendant must hold its train long enough for passengers to leave the train and reach the station platform "with ease," is misleading.—LOUISVILLE & N. R. CO. v. EAKINS' ADMR., Ky., 45 S. W. Rep. 529.

18. CHATTEL MORTGAGE—Sufficiency of Mortgage.—Though a description in a chattel mortgage conveying cattle be vague and uncertain as to age, marks, and brands, where it locates them in a feed lot on a certain farm, and embraces all the cattle in the feed lot, it is sufficient to pass title against creditors of the mortgagor.—EVANS-SNYDER-BUELL CO. v. TURNER, Mo., 45 S. W. Rep. 654.

19. CONSTITUTIONAL LAW—Obligation of Contracts.—A party whose interests are affected by a State statute cannot set up that the statute is void under the federal constitution, as impairing the obligation of a contract to which he is not a party.—WILLIAMS v. EGGLESTON, U. S. S. C., 18 S. C. Rep. 617.

20. CONSTITUTIONAL LAW—Officers.—The fact that the provisions as to the salaries of certain officers are invalid does not render the whole act invalid; there being no such dependency or connection between the compensation to be paid to different officers as would justify the courts in holding that the legislature would not have passed the act without the invalid provisions.—ANDERSON v. SULLIVAN, Minn., 75 N. W. Rep. 8.

21. CONSTITUTIONAL LAW—Police Power—Pool Selling.—Pub. Acts 1893, p. 240, prohibiting the business of transmitting money to race tracks without the State, there to be placed or bet on horse races, is not repugnant to the constitution of the United States, relating to the regulation of commerce.—STATE v. HARBOURNE, Conn., 40 Atl. Rep. 179.

22. CONTRACTS—Consideration for New Promise.—Where plaintiff refuses to perform his contract, and so notifies defendant, unless a certain change is made therein, and defendant, instead of bringing action for the breach, accepts the proposition of plaintiff, and acts on the same, it is an acceptance of the terms, and is a sufficient consideration therefor.—PIERCE v. WALTON, Ind., 50 N. E. Rep. 309.

23. CONTRACTS — Accord and Satisfaction.—Under Code, § 574, providing that acceptance of a less amount than that claimed, in satisfaction thereof, is a complete discharge of the same, plaintiff cannot recover, where he has accepted a check marked, "In full for services," and this, although he has attempted to qualify the acceptance by writing, "Accepted for one month's services," over his signature on the back thereof.—KERR v. SANDERS, N. Car., 29 S. E. Rep. 943.

24. CONTRACTS—Execution.—Where one hands a proposed contract in writing signed by him to another, the acceptance thereof by the latter, assenting to its terms, holding it and acting on it as a valid instrument, is equivalent to his formal execution of it.—SELLERS v. GREER, Ill., 50 N. E. Rep. 246.

25. CONTRACTS—Part Fulfillment—Sale.—A contract for the delivery of a certain number of cattle, unlike one for the building and completion of a house, is severable in its nature, and, if the vendee accepts and appropriates to his own use a portion of the property so contracted for, he must pay the stipulated price for such portion, less the damages sustained by reason of the failure of the vendor to make complete delivery.—SAUNDERS v. SHORT, U. S. C. C. of App., Ninth Circuit, 86 Fed. Rep. 225.

26. CORPORATIONS—Insolvent Corporation—Existing Liens.—When a court of equity takes control and custody of the assets of an insolvent corporation, it does not destroy existing liens, but assumes the burden of protecting the rights of all parties. It will not surrender the property in its custody, to be disposed of by other courts, but will, when necessary, order a sale of the assets, and distribute the funds.—MCRAE v. BOWERS DREDGING CO., U. S. C. C., D. (Wash.), 86 Fed. Rep. 344.

27. CORPORATIONS—Partnership.—The conveyance of firm property to a corporation formed by the partners, in exchange for company stock, is a step in the dissolution of the partnership, and the settlement of its affairs, as between the partners, and is governed by the rule requiring the utmost good faith and fairness between partners.—COGGSWELL & BOULTER CO. v. COGGSWELL, N. J., 40 Atl. Rep. 213.

28. COUNTY ATTORNEY—Duties.—Under Const. art. 5, § 21, providing for the election of a county attorney when there is no resident district attorney, and that he shall "represent the State in all cases in the district and inferior courts" of his county; and that, "if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the legislature"—where there is a county attorney, he will be allowed, and it is his duty to prosecute all offenses against the State begun before a city judge in his county, and will not be excluded therefrom because the offense may also be in violation of city ordinances.—JACKSON v. SWAYNE, Tex., 45 S. W. Rep. 619.

29. COVENANTS—Warranty of Title—Damages.—In an action to recover on a warranty for failure of title in a conveyance, the measure of damages would be a sum in the same proportion to the whole purchase money as the value of the part to which the title failed bears to the whole premises, estimated at the price paid.—HYNES v. PACKARD, Tex., 45 S. W. Rep. 562.

30. CRIMINAL EVIDENCE—Homicide—Threats.—In a prosecution for murder, where self defense was relied on, it was not prejudicial error to exclude evidence that defendant on one occasion, on seeing deceased a mile away, coming in his direction with a gun, had turned his horses around, and gone home by another road, since it was no part of the *res gestæ;* and there was nothing to show any manifestation of deceased's hostile intent toward defendant on that occasion.—HARRELL v. STATE, Tex., 45 S. W. Rep. 581.

31. CRIMINAL LAW—Aggravated Assault.—Under Pen. Code 1895, art. 601, subd. 6, defining an aggravated assault as one that "inflicts disgrace upon the person assaulted, as an assault and battery with a whip or cowhide," a male is guilty of an aggravated assault by forcibly feeling the private parts of a chaste female, against her will.—SLAWSON v. STATE, Tex., 45 S. W. Rep. 575.

32. CRIMINAL LAW—Appeal—Bastardy.—Neither the State nor the prosecutrix is entitled to appeal in a criminal action from a verdict or finding of not guilty.—STATE v. BALLARD, N. Car., 29 S. E. Rep. 899.

33. CRIMINAL LAW—Definition of "Accessory."—Pen. Code 1895, art. 86, defines an accessory as one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid, in order that he may evade arrest or trial, or the execution of his sentence. Held, that the person charged as accessory must have given some personal help to the offender; and the naked fact that one received stolen property, knowing it had been stolen, would not constitute the receiver an accessory in the burglary.—STREET v. STATE, Tex., 45 S. W. Rep. 577.

34. CRIMINAL LAW—Indictment—Grand Jury.—Under Code 1896, § 5269, denying the right to object to an indictment on any ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the proper officers, an indictment cannot be assailed by a motion to quash on a plea in abatement on grounds based upon the illegality of the grand jury, each raising objections directed to the indictment itself.—KITT v. STATE, Ala., 23 South. Rep. 485.

35. CRIMINAL LAW—Homicide—Intent.—Deliberate intent to kill must exist at the moment of killing in order to constitute malicious intent, and an instruction that the words "malice aforethought" do not necessarily imply deliberation is error.—MARZEN v. PEOPLE, Ill., 50 N. E. Rep. 249.

36. CRIMINAL LAW — Lotteries.—Defendant kept a stand, the circumference of which was divided into spaces by nails driven on the edge, and between the nails different articles of value were placed, on which the prices were marked. A spindle turned on a pivot, and the speculator obtained whatever was in the space at which the point of the spindle stopped. Held, that it was a lottery within Pen. Code 1895, art. 373.—BARRY v. STATE, Tex., 45 S. W. Rep. 571.

37. CRIMINAL LAW—Murder.—It is error not to charge on murder in the second degree where defendant is on trial as an accomplice, and the evidence is such that the principal would be entitled to such charge.—O'NEAL v. STATE, Tex., 45 S. W. Rep. 592.

38. CRIMINAL LAW—Plea of Not Guilty—Former Conviction.—Special pleas in bar in a criminal case must be in writing, and filed on arraignment, before pleading to the merits. It therefore follows that there was no error in the refusal of the court to allow evidence tending to show a former conviction, while the case was at issue upon the plea of not guilty; nor was there any error, pending the trial of this issue, in refusing to allow the defendant to file a plea of *autrefois convict.*—HALL v. STATE, Ga., 29 S. E. Rep. 915.

39. CRIMINAL LAW — Swindling — Representations.—One obtaining a thing of value by falsely representing that a certain collection agency would pay a certain per cent. on accounts turned over to it which it failed to collect, is not guilty of swindling, as the representation is of something to be done in the future.—HURST v. STATE, Tex., 45 S. W. Rep. 573.

40. CRIMINAL LAW—Theft.—Defendant was working in a storehouse, but it was not shown in what capacity. On Sunday—on which day the storehouse was closed—the owner went out of town, and left the key with defendant, to take care of the building until the next morning, when he returned, and found that defendant had taken some of the goods and disappeared. Held, that defendant was guilty of theft, and not embezzlement, since he was only a bare custodian of the goods in the capacity of a servant.—ROEDER v. STATE, Tex., 45 S. W. Rep. 570.

41. CRIMINAL LAW — Theft — Intent—Insanity.—One taking property while temporarily insane from drunkenness, without intent to steal, is not guilty of theft by appropriating it with such intent when he comes to himself.—CADY v. STATE, Tex., 45 S. W. Rep. 568.

42. CRIMINAL LAW—Trial—Preparation of Defense.—The constitutional guaranty that the defendant in a criminal prosecution shall enjoy the right to defend himself, and to have the assistance of counsel, is not an empty formality, but an inestimable privilege; and counsel should be allowed reasonable time to prepare the defense.—STATE v. POOL, La., 23 South. Rep. 503.

43. CRIMINAL PRACTICE—Habeas Corpus—Errors in Criminal Trial.—If the court has jurisdiction of the person of the accused and of the crime charged, and does not exceed its lawful authority in passing sentence, its judgment is not void whatever errors may have occurred during the trial.—STATE v. LEIDIGH, Neb., 75 N. W. Rep. 24.

44. DEED—Acknowledgment.—Where a deed and the certificate of acknowledgment by husband and wife are regular on the face of the instrument, the testimony of the wife (the husband having died) that she did not sign the deed, that her husband was very weak about the time the deed is alleged to have been executed, and that she knows he never signed it, "unless when he had a wild spell," does not overcome the certificate of acknowledgment.—DAVIS v. HOWARD, Ill., 50 N. E. Rep. 258.

45. DEEDS — Construction — Evidence. — A question whether a grant in a patent for lands was upon a condition is one to be determined by the court from the construction of the instrument, and extrinsic evidence relating to other grants is inadmissible.—STUART v. CITY OF EASTON, U. S. S. C., 18 S. C. Rep. 650.

46. DEEDS—Delivery.—The deed in question was delivered to the attorney of the grantee therein named, to be examined. The title to a part of the land was found not to be satisfactory, and thereupon it was agreed that the description of this part should be erased from the deed by the grantee, that the rest of the land should be paid for at a certain agreed price, and when such erasure was made and the price paid the deed should be considered as delivered. The price was paid, but the erasure was never made. Held, the court was justified in finding that the deed was delivered, and it cannot be considered as delivered as to a part of the land, but not as to the other part.—JAMES v. CITY OF ST. PAUL, Minn., 75 N. W. Rep. 5.

47. DEED—Intention of Grantor.—When the language and terms employed in a written instrument are explicit, or have a generally accepted meaning, or have acquired a technical application, the letter of the instrument must control; but when the language is ambiguous or vague, or the terms employed create uncertainties as to intent, the safe rule is to read and apply every part as a whole, and, thus discovering what the real mind of the party was, to follow that to its

practical conclusion.—SPEED v. ST. LOUIS M. B. T. R. Co., U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 235.

48. DEEDS—Operative Words—Conditions.—A quit-claim deed conveys an indefeasible estate, though containing a recital that it is made with the understanding that the grantee "will take care of and see that he (the grantor) is properly treated during his lifetime."—MCANAW v. TIFFIN, Mo., 45 S. W. Rep. 656.

49. ESTATES—Remainders—Construction of Deed.—A deed conveying land to a wife during her life, or until she marries again, surviving the grantor, with remainder over to their children, creates a vested remainder in the children, which is not devested by the death of the life tenant before that of the grantor.—JOHNSON v. ROBERTSON, Ky., 45 S. W. Rep. 523.

50. ESTOPPEL—Husband and Wife.—A wife, with the knowledge of her husband, included property belonging to him in a mortgage given by her to secure her debt. The husband made no objection, except to his wife, but allowed her to obtain goods on the faith of the mortgage, assisted her in selling them, and did not inform the mortgagee that he claimed the property until two years after the execution of the mortgage. Held, that the husband was estopped from asserting his ownership as against the mortgagee.—CHURCHILL v. HOHN, Ky., 45 S. W. Rep. 498.

51. ESTOPPEL IN PAIS—Incumbrance.—Where one purchases property subject to an incumbrance, and desires to pay to his vendor the difference between the purchase price and the amount of the incumbrance, and applies to the holder of the incumbrance for information as to the amount then due him, and such holder, with a full knowledge of the purpose for which such information is asked, states an amount which he declares to be all that is then due him, and the purchaser, acting upon the faith of this statement, has a settlement with his vendor, and reserves the amount which the holder of the incumbrance declared to be due him, such holder is estopped from claiming, as against the property or the purchaser, any larger sum than that reserved by the purchaser at the time of the settlement with his vendor.—FULTON BLDG. & LOAN ASSN. v. GREENLEA, Ga., 29 S. E. Rep. 932.

52. EXECUTION—Action on Forthcoming Bond.—When a claim has been interposed to the levy of an execution, and the case has been returned to a court which has no jurisdiction of such case, and for that reason dismissed by that court, this gives no right of action by the plaintiff in *fi. fa.* upon the forthcoming bond made by the claimant.—BRANNAN v. CHEEK, Ga., 29 S. E. Rep. 937.

53. FALSE IMPRISONMENT—Irregular Process—The law lying at the foundation of actions for false imprisonment based on irregular process is that, if a person has been arrested and imprisoned under color of legal process, which is thereafter set aside for irregularity, the person who set that process in motion is responsible in damage to him upon whom the indignity and deprivation of liberty have been visited.—BRYAN v. CONGDON, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 221.

54. FEDERAL COURTS—Diverse Citizenship.—Where three railway corporations, organized under the laws of three different States, are consolidated under the laws of each of the States, the consolidated corporation is a citizen of each of the States; and a citizen of one of the States cannot maintain an action in a federal court sitting in that State against the corporation on the ground of diverse citizenship.—BALDWIN v. CHICAGO & N. W. RY. CO., U. S. C. C., W. D. (Mich.), 86 Fed. Rep. 167.

55. FEDERAL COURTS—Jurisdiction—Amount in Controversy.—When, from the nature of the case as stated in the plaintiff's pleading, there would not legally be a judgment for an amount necessary to the jurisdiction of a United States court, jurisdiction cannot attach, though the damages are laid in a larger sum.—VANCE v. W. A. VANDERCOOK CO., U. S. S. C., 18 S. C. Rep. 645.

56. Federal Offense—Larceny—Property of the United States.—Rev. St. § 5456, providing for the punishment of "every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same," cover two distinct offenses and an indictment under the latter clause need not charge a forcible taking.—JOLLY v. UNITED STATES, U. S. S. C., 18 S. C. Rep. 624.

57. FORCIBLE ENTRY—Judgment.—In an action for forcible entry and detainer, a judgment for possession at some time in the future is void, and the threatened enforcement of such judgment may be restrained by injunction.—MAYBIN v. FITZGERALD, Tex., 45 S. W. Rep. 611.

58. FRAUDULENT CONVEYANCE—Mortgage to Secure Creditors—Fraud.—A mortgage upon merchandise, given by a debtor, in good faith, who is not shown to be insolvent or in failing circumstances, to a trustee, to retail the property either for cash or on time, as appeared for the best interests of creditors whose claims he was to pay from the proceeds thereof, is not fraudulent *per se* as to creditors whose claims were not secured thereby.—FRY v. HAWKINS, Tex., 45 S. W. Rep. 621.

59. GARNISHMENT—Superintendent of Schools.—The salary of a county superintendent of common schools cannot be subjected to the payment of a judgment in an equitable proceeding, under Code Civ. Proc. § 439, since the office is one necessary to the maintenance of the common school law, and cannot be interfered with on account of public policy.—HEILBRONNER v. POSEY, Ky., 45 S. W. Rep. 505.

60. HOMESTEAD—Execution—Claim.—Where a levy is made on a homestead under execution issued on a judgment of a justice of the peace, a claim of exemption, under Code 1886, § 2521, which provides that a declaration claiming the right of homestead may be filed with the officer making a levy of process at any time before sale thereunder, must be filed before an order for the sale of the land is granted.—RODGERS v. LACKLAND, Ala., 23 South. Rep. 489.

61. HOMESTEAD — Execution Sale — Injunction.—Where, on execution sale of a homestead, nothing could be realized, and the only effect would be to cloud the title, a sale will be enjoined, the statute forbidding it in such cases.—KOEN v. BRILL, Miss., 23 South. Rep. 481.

62. HUSBAND AND WIFE—Tenants by Entirety.—Under the statutory proceeding for the assessment of real estate for the construction of gravel roads (Act 1885, ch. 57), remonstrances were filed before the board of commissioners by a husband and wife separately. From a judgment assessing their lands, the husband alone appealed. The husband and wife held the lands as tenants by the entirety. On appeal, the judgment of the board of commissioners was found to be void, and the husband was released from the assessments. Held, that the release of the husband was equivalent to a release of the lands, and, since husband and wife were tenants by the entirety, the wife was also released.—HUMBERD v. COLLINGS, Ind., 50 N. E. Rep. 314.

63. INJUNCTION—Keeping of Bawdy House.—An injunction will not be granted to suppress the keeping of a bawdy house, the criminal law furnishing an adequate remedy.—NEAF v. PALMER, Ky., 45 S. W. Rep. 506.

64. INJUNCTION BOND—Signature of Principal.—Held, that the evidence proved that the sureties on a bond intended to be bound without the signature of their principal, although named as such in the body of the bond.—SAFRANSKI v. ST. PAUL, M. & M. RY. CO., Minn., 75 N. W. Rep. 17.

65. INSURANCE—Total Destruction.—Total destruction of a building, within the meaning of a fire insurance policy insuring against such loss, means the complete destruction of the insured property, so that nothing of value remains, and so that, though the materials of

which the building was composed be not utterly destroyed or obliterated, and though part of the building be left standing, it has lost its character as a building, and has become instead a broken mass,—CORBETT v. SPRING GARDEN INS. CO., N. Y., 50 N. E. Rep. 282.

66. INTOXICATING LIQUORS—License.—The fact that the granting of a license to retail liquors in a certain room would probably violate Acts 1895, p. 250, § 4, providing that the room shall be so arranged that all parts of it can be seen from the street or highway, and imposing penalties for its violation, is not a ground for refusal to grant such license.—GATES v. HAW, Ind., 50 N. E. Rep. 299.

67. JUDGMENT—Infant.—Where a minor is sued under a wrong given name, and the citation and a certified copy of the petition is served upon him, and he employs counsel, who files an answer for him, and the court appoints a guardian *ad litem*, and the action is tried without objection, the judgment is binding on the defendant until set aside by some direct attack, and cannot be collaterally attacked by him.—MCGHEE v. ROMATKA, Tex., 45 S. W. Rep. 552.

68. JUDGMENT—Execution.—A judgment and execution sale which are founded upon a citation and writ of attachment which have never been served in any manner upon the defendant temporarily absent will be held void, in the exercise of the supervisory power of the supreme court by the writ of *certiorari*.—STATE v. TAYLOR, La., 23 South. Rep. 509.

69. JUDGMENT—Vacating for Fraud.—In order to set aside a judgment for fraud, it must appear that the fraud was in the procurement of the judgment, and not merely in the cause of action on which the judgment was founded, and which could have been interposed as a defense, unless such interposition was prevented by the fraud of the adverse party; and especially is this so where the judgment is attacked in a collateral proceeding.—BATES v. HAMILTON, Mo., 45 S. W. Rep. 641.

70. LIFE INSURANCE—Legal Representatives.—"Legal representatives" in a policy of insurance ordinarily means executors or administrators when not qualified by the context, but it may be shown to mean next of kin or successors or assigns.—PITTEL v. FIDELITY MUT. LIFE ASSN. OF PHILADELPHIA, U. S. C. C. of App., Fifth Circuit, 86 Fed. Rep. 255.

71. LIMITATION OF ACTIONS—Breach of Warranty.—Eviction, either actual or constructive, is essential to a right of action for damages for the breach of the covenant of warranty of title, and the statute of limitations begins to run only from the date of such eviction.—NORTHERN PAC. R. CO. v. MONTGOMERY, U. S. C. C. of App., Ninth Circuit, 86 Fed. Rep. 251.

72. MANDAMUS—To Compel Tax to Pay Judgment.—The federal courts may issue writs of *mandamus* to compel the levy of a tax to pay judgments which they have rendered against counties or other municipal corporations, when, by the laws of the State, it is expressly or impliedly made the duty of the officers of such municipalities to make provision for the payment of such judgments by an exercise of the power of taxation.—DRUEL COUNTY, NEB., v. FIRST NAT. BANK OF BUCHANAN COUNTY, MO., U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 264.

73. MASTER AND SERVANT—Defective Railway Bridge—Duty of Inspection.—A railroad company owes to its train employees the duty of making reasonably frequent and reasonably thorough inspections of the condition of the timbers in a bridge, and is bound to apply such tests as are ordinary and usual in that business to ascertain any defects which exist therein.—CHICAGO G. W. RY. CO. v. HEALY, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 245.

74. MASTER AND SERVANT—Negligence.—One who is hired and paid by the contractor of a building, which contractor is to be paid by the owner a percentage over and above the cost, is a servant of the contractor, and not of the owner.—WHITNEY & STARRETT CO. v. O'ROURKE, Ill., 50 N. E. Rep. 242.

75. MASTER AND SERVANT—Negligence—Assumption of Risks.—When one enters the employment of another, agreeing to serve him for a stipulated salary or wage, he thereby assumes, in the absence of an express contract to the contrary, the ordinary perils incident to that service, and included in these is the liability to injury at the hands of a negligent fellow-servant.—MISSOURI PAC. RY. CO. v. LYONS, Neb., 75 N. W. Rep. 81.

76. MASTER AND SERVANT—Negligence in Employing Servants.—While a servant impliedly assumes the risk of negligence by his fellow-servants, yet he does not assume any risk on account of the negligence of the master, which is unknown to him; hence the fellow-servant rule has no application to a case where the master is negligent in employing or retaining in his service a careless and incompetent servant, who by his negligence injures his co-servant, who has no notice of his character.—JENSON v. GREAT NORTHERN RY. CO., Minn., 75 N. W. Rep. 2.

77. MECHANIC'S LIEN—Notice—Attachment.—Where a city paid the amount due a building contractor into court, and made no contest, an attaching creditor of the contractor cannot defeat a mechanic's lien of a subcontractor which attached previous to the former's levy, by claiming that the building constructed (a pest house), being necessary to the conduct of the municipal government, was not subject to levy and forced sale.—AUSBECK v. SCHARDIEN, Ky., 45 S. W. Rep. 507.

78. MERGER—Estates—Mortgages.—It is a general rule that where two unequal estates vest in the same person, at the same time, without an intervening estate, the smaller is thereupon merged in the greater. But merger does not always or necessarily result from such a coinciding of such estates. Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected.—PETERBOROUGH SAV. BANK v. PIERCE, Neb., 75 N. W. Rep. 20.

79. MORTGAGE—Execution by Married Woman.—In an action for foreclosure of a mortgage, an answer averring that the note and mortgage were executed by a married woman, on her separate property, to secure antecedent debts of her husband, and for no other purpose or consideration, is a sufficient answer of suretyship, so as to render the mortgage and note void as to such married woman.—BOYD v. RADABAUGH, Ind., 50 N. E. Rep. 801.

80. MORTGAGES—Foreclosure.—Plaintiff purchased a part of a tract of land covered by a mortgage, assuming a certain part of the indebtedness secured thereby. Thereafter the mortgagee took a quitclaim deed from the mortgagor for the balance of the tract, assuming that part of the debt which the mortgagor had agreed to pay at the time of the sale to plaintiff. Held, that the mortgagee could not, on foreclosure, subject the entire land to the payment of the whole debt.—TOMLINSON v. GIVENS, Mo., 45 S. W. Rep. 645.

81. MORTGAGE—Foreclosure—Rights of Junior Mortgagee.—A senior mortgagee, who takes possession under foreclosure sale and purchase of the owner's equity of redemption, is not accountable for the rents to a junior mortgagee.—ADLER GOLDMAN COMMIS. CO. v. HERREN, Ark., 45 S. W. Rep. 543.

82. MORTGAGES—Transfer of Premises—Notice.—The purchaser of the equity of redemption is charged with notice of a covenant of the mortgage to erect on the premises a building; and when he removes such building, it being of a permanent character, and affixed for use with the realty, he is presumed to have done so as a willful wrongdoer, and will not be permitted to profit thereby.—TATE v. FIELD, N. J., 40 Atl. Rep. 206.

83. MUNICIPAL BONDS—Estoppel by Recitals.—Where municipal corporations have lawful authority to issue bonds upon the adoption of certain preliminary proceedings, and the adoption of those proceedings is certified on the face of the bonds by the officers to whom the law intrusts the power, and upon whom it imposes

the duty, to ascertain, determine, and certify this fact, before or at the time of issuing the bonds, such a certificate estops the municipality, as against a *bona fide* purchaser of the bonds, from proving its falsity to defeat them.—BROWN v. INGALLS TP., KAN., U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 261.

84. MUNICIPAL CORPORATION—Bicycle—Right of Way.—A bicycle is not a vehicle, within an ordinance giving to vehicles the right of way on the tracks of the street railway companies in the direction in which the cars ordinarily run.—TAYLOR v. UNION TRACTION CO., Pa., 40 Atl. Rep. 159.

85. MUNICIPAL CORPORATIONS — Disqualification of Officer.—A person who is superintendent of special assessments and city collector is disqualified from acting as commissioner of assessments.—CHASE v. CITY OF EVANSTON, Ill., 50 N. E. Rep. 241.

86. MUNICIPAL CORPORATIONS — Streets—Powers of Council.—The city council has no power to grant any portion of a street to any person for private use to the exclusion of the public.—HIBBARD v. CITY OF CHICAGO, Ill., 50 N. E. Rep. 256.

87. MUNICIPAL CORPORATION—Ordinance—Validity.—The ordinance of a city giving the exclusive privilege to the public contractor to remove the dead carcasses of animals, and allowing such fees therefor as amount practically to a confiscation of the property, is unconstitutional.—KNAUER v. CITY OF LOUISVILLE, Ky., 45 S. W. Rep. 510.

88. MUNICIPAL CORPORATIONS—Refunding Bonds—Estoppel by Recitals.—A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious.—CITY OF HURON v. SECOND WARD SAV. BANK, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 272.

89. MUNICIPAL CORPORATIONS—Streets—Negligence.—Although a city may lay off a street 80 feet in width, it is not required to improve and maintain it for travel throughout its entire width, but it has performed its duty to the public by improving and maintaining such portion thereof as is sufficient for the reasonable accommodation of the public.—CITY OF HANNIBAL v. CAMPBELL, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 297.

90. OFFICER AND OFFICERS—De Facto Officer.—The law recognizes no one even as an officer *de facto* who fills an alleged public office that has no existence under any constitutional provision, or by virtue of any color of legislative enactment.—HERRINGTON v. STATE, Ga., 29 S. E. Rep. 931.

91. PARTNERSHIP — Use of Retiring Partner's Name—Injunction.—Where, on dissolution, one partner agreed with another, who purchased the business and good will, to permit the use of his name in the style of the firm conditioned upon sufficient legal notice thereof to absolve him from liability for subsequent debts and contracts of the business, the right to the retiring partner's name could not be assigned, nor could the right to assign be legally inferred from the purchase of the good will, and the naked right to use the name of the retiring partner in the business.—BAGBY & RIVERS FUR. CO. v. RIVERS, Md., 40 Atl. Rep. 169.

92. PLEADING — Action on Check.—While it is necessary, in action on a check against the drawer, to allege presentment of the check for payment, and its dishonor, it is not necessary to allege that notice of its dishonor was given to the defendant.—SPINK & KEYES DRUG CO. v. RYAN DRUG CO., Minn., 75 N. W. Rep. 18.

93. PLEDGE—Factors — Collaterals Securing Balance.—A factor holding, as collateral security for the payment of the ultimate balance to be due him on his factor's account, the negotiable note of his customer, bearing interest after maturity, and secured by mortgage on his plantation, must be prepared to surrender the collateral when the account is closed, and payment of the amount due is tendered him by the debtor.—ROMERO v. NEWMAN, La., 23 South. Rep. 498.

94. PRINCIPAL AND AGENT—Ratification by Principal.—Where an agent rents a farm belonging to his principal and receives, in part payment of the rental, a note signed by his principal and purchases for himself, at the same time, the entire crop of the renter, and the principal promptly repudiates such a settlement hereafter—silence is not evidence of ratification, and the agent is liable for money had and received in the amount of the note.—SNAPP v. STANWOOD, Ark., 45 S. W. Rep. 546.

95. PRINCIPAL AND SURETY—Discharge.—A surety on an obligation purporting to be executed for the purpose of assisting the maker of a note to raise funds with which to buy stock and run a mill is released where the one furnishing the money, and who is charged by acceptance of the obligation with knowledge of said purpose diverts a half of it, without knowledge of the surety, to the payment of an old debt of the maker, and this though there be no fraud on his part, and though the debt was secured, and the release of the security added to the protection of the surety.—GANO v. FARMERS' BANK OF KENTUCKY AT GEORGETOWN, Ky., 45 S. W. Rep. 519.

96. PUBLIC LANDS — Entry—Ownership.—In an action of trespass to realty, parol evidence of prior survey and continuous possession is proper to show good faith and a continuous intent to obtain a patent, and hence to show that a patent issued under a subsequent survey is void.—BOREING v. HURST, Ky., 45 S. W. Rep. 522.

97. RAILROAD COMPANY—Contributory Negligence.—Where plaintiff is guilty of contributory negligence in attempting to cross a street car track, he cannot recover, even though the servants of defendant, operating the car, could have, by the exercise of diligence, discovered his peril in time to have prevented running him down.—AUSTIN DAM & S. RY. CO. v. GOLDSTEIN, Tex., 45 S. W. Rep. 600.

98. RAILROAD COMPANY — Crossing—Negligence.—An instruction authorizing recovery if the failure of engineer to signal on approaching the crossing, and the placing of an obstruction to view on the right of way, "was or were such an act or acts as an ordinary prudent person would not have committed," is erroneous, as authorizing a finding that an obstruction to view on the right of way is negligence.—INTERNATIONAL & G. N. RY. CO. v. KNIGHT, Tex., 45 S. W. Rep. 556.

99. RAILROAD COMPANY—Elevated Railroad—Injunction.—An injunction against the operation and continuance of an elevated road, in the city of Brooklyn, should not be granted on the suit of an abutting owner who, though proving that the operation of the road obstructs the circulation of air, and is attended with noise, smoke, and loss of light, and that his abutting property has decreased in rental value, fails to further show that such decrease was the result of the existence of the railroad or its operation.—MARSH v. KINGS CO. EL. RY. CO., U. S. C. C. of App., Second Circuit, 86 Fed. Rep. 189.

100. RAILROAD COMPANY — Negligence—Person Near Track.—The ordinary presumption is that a workman engaged in street work near a railroad track will look after his own safety on the approach of a train; but, when the engineer sees that he is not doing so, it becomes the engineer's duty to use all reasonable means in his power to arrest the man's attention and avoid injuring him; and it was proper to refuse an instruction that it was not the duty of the engineer to stop his train even if he saw the man continuing at his work.—LOUISVILLE & N. R. CO. v. MORLAY, U. S. C. C. of App., Seventh Circuit, 86 Fed. Rep. 240.

101. RAILROAD COMPANY—Negligence—Precautions as to Bell.—It is the duty of a railroad to supply an engine with a bell which is adequate for the purpose, and its duty in this regard is not discharged if the be

is cracked, or otherwise defective, and does not sound loud enough to warn persons under ordinary circumstances.—NORTHERN PAC. R. CO. v. KROHNE, U. S. C. C. of App., Ninth Circuit, 86 Fed. Rep. 230.

102. RELEASE AND DISCHARGE—Knowledge of Contents of Instrument.—A railroad employee claiming damages for personal injuries submitted to the company a proposition of settlement, one stipulation being that he was to "remain in the service of the company as long as he desired, providing his work was satisfactory." He subsequently signed a release which the company's claim agent presented to him, in which it was agreed to re-employ him "for such time only as may be satisfactory to said company." Held that, in the absence of fraud or mistake, he was presumed to have known the contents of the instrument, and to have consented to such variation from the terms proposed.—PHARES v. LAKE SHORE & M. S. RY. CO., Ind., 50 N. E. Rep. 306.

103. REMOVAL OF CAUSES—Local Prejudice.—After a cause has been tried in a State court, and a mistrial entered, it cannot be removed on account of local prejudice.—FARMERS' & MERCHANTS' NAT. BANK OF WACO v. SCHUSTER, U. S. C. C. of App., Fifth Circuit, 86 Fed. Rep. 161.

104. REPLEVIN—Sequestration — Bond — Sureties.—A sequestration was levied, and the goods replevied. The writ of sequestration was quashed. Held, that the sureties were released from liability on the replevy bond.—MITCHELL v. BLOOM, Tex., 45 S. W. Rep. 558.

105. SALE—Refusal to Accept Goods.—A vendor of personal property, in selling such property when the vendee has refused to take and pay for it according to contract, does not act as the agent of the vendee, in a literal sense, nor does his adopting this remedy confer upon the vendee any title or interest in the property.—MOORE v. POTTER, N. Y., 50 N. E. Rep. 271.

106. SPECIFIC PERFORMANCE—Contract as to Personalty.—As a general rule, equity will not decree specific performance of contracts relating to personal property. In order to sustain a bill for the specific performance of such a contract, it is necessary to allege some good reason in equity and good conscience to take the case out of the general rule above stated. (a) In the present case no such reason was alleged or proved.—CAROLEE v. HANDELIS, Ga., 29 S. E. Rep. 935.

107. TAXATION—Equalization—Suit to Enjoin Collection.—Where the law creates a board of equalization, and provides that "it shall be the duty of persons interested to appear at the time and place appointed for the meeting of the board, and if it shall appear that there are any lands assessed under or beyond their actual value such board shall make the proper correction," a person aggrieved by the wrongful act of the assessor cannot maintain a suit in equity to enjoin the collection of any portion of the tax unless he first seeks redress at the hands of the county board of equalization.—ALTSCHUL v. GITTINGS, U. S. C. C., D. (Oreg.), 86 Fed. Rep. 200.

108. TAXATION—Enforcement—Injunction.—Ky. St. § 4021, provides that the commonwealth shall have a lien on property assessed for taxes due, which shall not be defeated by sale, unless made more than five years before the proceedings to enforce the lien, and nothing shall be exempt from sale for taxes. Held, that where a sheriff voluntarily pays taxes assessed against one who owns both real and personal property, and knowingly permits the owner to dispose of his personal property, which was sufficient in value to have paid his taxes, he may be enjoined from selling the real estate to pay the entire taxes, at the suit of one who has a lien on the real estate prior to the lien of the unpaid taxes.—ALLEN v. PERRINE, Ky., 45 S. W. Rep. 500.

109. TENANT IN COMMON—Waste.—Under Code, § 627, providing that one tenant in common may maintain an action for waste against his co-tenant or joint tenant, tenants in common may maintain an action against their co-tenant to restrain waste.—MORRISON v. MORRISON, N. Car., 29 S. E. Rep. 901.

110. TRADE-MARK—Injunction.—Upon a bill and affidavits showing that "Fig Syrup" or "Syrup of Figs" was not known in connection with a liquid laxative medicine until it was prepared by the complainant; that the good will in its manufacture is of great value; and that defendants, desiring to perpetrate a fraud and deceive the public, are making and selling a laxative under that name, a preliminary injunction will be granted.—CALIFORNIA FIG SYRUP CO. v. CLINTON E. WORDEN & CO., U. S. C. C., N. D. (Cal.), 86 Fed. Rep. 212.

111. TRESPASS—Damages to the Freehold.—An action of trespass, or trespass on the case, to recover damages for injury to the freehold, or for severance and conversion of a portion of the freehold, cannot be maintained by the true owner, out of possession, against one in open, notorious, exclusive, adverse and hostile possession, claiming under color of title.—JOHNSON v. C. & N. W. SAND & GRAVEL CO., U. S. C. C. of App., Seventh Circuit, 86 Fed. Rep. 269.

112. TRUSTS—Misappropriation of Funds.—Where a trustee appropriates trust funds to his own use, and commingles them with his private funds, so that they cannot be distinguished, and makes investments from such common fund, innocent creditors are entitled to subject the property as his, and the *cestui que trust* can have no specific lien on either the property or the money so invested.—BRIGHT v. KING, Ky., 45 S. W. Rep. 508.

113. TRUST DEED—Fraudulent Conveyance.—A trustee in a deed of trust for certain creditors, though participating in the fraudulent intent with which it is executed, is on the acceptance thereof by one of the beneficiaries, who did not participate in the fraud, "entitled to the possession," so that an attachment by creditors of the grantor by seizure of the property, and not by giving notice, where defendant in attachment is "not entitled to the possession," was void.—SUTTON v. SIMON, Tex., 45 S. W. Rep. 559.

114. TRUST DEEDS—Sales — Sheriff's Deed.—A trust deed provided that the complete title should vest in the grantee on failure to pay interest or principal when due; that the grantee, or, in case of his absence, death or refusal to act in any wise, then the acting sheriff of the county, at the request of the legal holders of the secured note, should sell the property; that on such sale the grantee, or his successors in trust in fee-simple of the property sold, should execute a deed to the purchaser thereof. Held, that a deed executed by the sheriff was invalid, since the only power given him was that of making the sale on certain contingencies.—WOODS v. ROZELLE, Miss., 23 South. Rep. 483.

115. VENDOR AND PURCHASER—Executory Contract—Damages.—In order to entitle a party to recover damages for the breach of an executory contract of sale of real estate, he must show a tender of performance upon his part, and a demand of performance by the other party, unless it appears that such other has absolutely disabled himself from performing on his part. HIGGINS v. EAGLETON, N. Y., 50 N. E. Rep. 287.

116. WITNESSES—Impeachment.—Letters written by a witness, and containing statements differing from the testimony given by him, are competent for the purpose of discrediting him, although not competent as evidence of the facts therein contained.—BACOT v. HAZLEHURST LUMBER CO., Miss., 23 South. Rep. 481.

117. WITNESS—Transactions with Decedent.—The administrator of C, a deceased daughter of the deceased mortgagee, and a daughter of C, to whom the administrator had assigned a half interest in the mortgage, sued the mortgagor individually and as administrator of R, the other deceased daughter of the deceased mortgagee, to foreclose. The money was admitted to be due, and the only disputed question was as to its distribution. Held, that complainant, daughter of C, was not competent to testify to statements by R during her life, contracting to bequeath her share in the mortgage to C.—THOMPSON v. WEST, N. J., 40 Atl. Rep. 197.